THE PROGRESS OF THE LAW, 1919–1922

EVIDENCE. III

REAL EVIDENCE

AN article by Sidney L. Phipson analyzes the treatment of this subject by the text-writers and their definitions.[148] Finger-prints are discussed in two articles.[149] Decisions in Washington and Texas disagree on the question whether an unauthorized view by the jury should be a ground for reversal; it should not be if not prejudicial.[150]

THE BEST EVIDENCE RULE

This rule has been too rigidly enforced in this country in situations where the secondary evidence is admittedly accurate. The simple English procedure, where a long series of letters and telegrams is involved in a case, is to include the full correspondence in the briefs, and read it to the jury without interruptions unless some matter is disputed.[151] We might wisely do likewise. Another rule which ought to be adopted everywhere is, that the incorporation of a party to a suit may be proved orally without the need of a record;[152] indeed, corporate existence might well be taken for granted unless questioned. Another matter which has sensibly been relieved from the burden of the best evidence rule is the moving picture. In *Feeney* v. *Young*[153] a woman, who being compelled to

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[148] " 'Real' Evidence," 29 YALE L. J. 705 (1920).

[149] M. Carlson, "Forging Finger-prints," 11 J. CRIM. L. & CRIM. 141 (1920); A. M. Kidd, "The Right to take Finger-prints, Measurements and Photographs," 8 CAL. L. REV. 25 (1919). See Locard, *infra*, note 284.

[150] Leopold *v.* Livermore, 197 Pac. 778 (Wash., 1921), no reversal; Texas Midland Ry. *v.* Brown, 228 S. W. 915 (Tex. Comm. App., 1921), reversal; both noted in 31 YALE L. J. 217. The absence of the accused during the view does not violate his constitutional right of confrontation, State *v.* Rogers, 145 Minn. 303, 177 N. W. 358 (1920).

[151] Frank H. Burt, "Documentary Evidence in the English Law Courts," 5 MASS. L. Q. 63 (1920).

[152] Kelley *v.* Stern Pub. & Nov. Co., 147 Ark. 383, 227 S. W. 609 (1921); the divided authorities are collected in 5 MINN. L. REV. 475.

[153] 191 App. Div. 501, 181 N. Y. Supp. 481 (1920), noted in 19 MICH. L. REV. 101.

undergo a surgical operation had consented that a film should be made for exhibition to medical societies, sued for violation of her statutory right of privacy because it was shown in two leading moving-picture houses in New York as part of a photoplay named "Birth." She offered spectators of the play to testify that they had recognized her in the pictures. This was excluded by the trial court on the ground that the film itself was the best evidence. As this was too small to ascertain anything, and a representation in court was impracticable, her complaint was dismissed. The Appellate Division granted a new trial, holding that the evidence of eyewitnesses was competent. In an English suit by Elinor Glyn to enjoin an unauthorized burlesque of "Three Weeks," the judge held that such evidence was not secondary evidence and was the only kind that in strictness could be given, although he was himself shown the play on the screen, which he found to be "vulgar to an almost inconceivable degree." [154]

The Parol Evidence Rule[155]

Williston's new treatise on The Law of Contracts[156] has a chapter on "General Rules for the Interpretation or Construction of Contracts and the Parol Evidence Rule." The heading indicates the difficulty of discussing this rule apart from the whole question of interpretation of language. Whereas J. B. Thayer thought that there were three Parol Evidence Rules, and Wigmore increased the number to four, Williston[157] decides there is only a single rule. His discussion of parol warranties is especially interesting.[158]

For the equitable and tort points in this case, see Z. Chafee, Jr., "Equitable Relief against Torts," 34 HARV. L. REV. 388.

[154] Glyn *v.* Western Feature Film Co. Ltd., 114 L. T. R. 354 (1915); the injunction was refused because the plaintiff's book was too immoral to be protected by copyright and because burlesques are not infringements.

[155] See also: Bills and notes cases, 21 COL. L. REV. 282, 596; 7 VA. L. REV. 84; 17 LAW. SER. MO. BULL. 51 (1919); 11 A. L. R. 637, note. Mistake, Forgione *v.* Lewis, [1920] 2 Ch. 326. Custom contradicting writing, The Turid, [1920] P. 370. Parol agreement for time of performance when contract names no time, 5 MINN. L. REV. 226 (1921); 2 WILLISTON, CONTRACTS, § 640. Enrolled copy of statute as conclusive evidence of enactment, W. H. Loyd, "Pylkington's Case and its Successors," 69 U. PA. L. REV. 20 (1920). Parol contract for bequest to adopted child, not in adoption agreement, 22 COL. L. Rev. 178.

[156] N. Y., 1920, Vol. II.

[157] *Op. cit.*, § 636.

[158] § 643.

Delivery and Intent. An article by H. W. Ballantine, "Delivery in Escrow and the Parol Evidence Rule," [159] takes up the various views on the troublesome problem, whether the doctrine of *Pym* v. *Campbell* [160] allows parol proof of a conditional delivery of a deed or other sealed instrument to the grantee or obligee. On the whole he favors giving effect to such conditions, but says that the time has come to discard altogether the unsatisfactory ceremony of delivery in favor of a more clear-cut formality, such as execution before a government official. The recent Virginia case of *Whitaker* v. *Lane* [161] allows proof that a sealed contract was delivered in escrow to the obligee, following Wigmore's view [162] after an exhaustive survey of the authorities. The same position is taken by Tiffany [163] and a full note in the *Minnesota Law Review*.[164] On the other hand, some jurisdictions are bound by authority to declare the condition invalid, especially in the delivery of a deed. Oliver S. Rundell's article on "Delivery and Acceptance of Deeds in Wisconsin" [165] shows this to be the law in that state, and *Mitchell* v. *Clem* [166] declined to overrule the same proposition in Illinois, although the court by a bare majority managed to give effect to the condition on the ground that the facts showed want of delivery and only manual possession in the grantee, not an escrow. The dissenting judges vigorously question this interpretation of the facts. The case furnishes a striking illustration of Williston's statement [167] that the distinction between delivering in escrow to the obligee and entrusting possession to him without intention to deliver is "somewhat fine." The truth seems to be, that the majority of the Illinois Supreme Court felt the prevailing drift away from the old doctrine, and went as far as the principle of *stare decisis* permitted.

Another possible exception to *Pym* v. *Campbell* [168] is involved in

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[159] 29 YALE L. J. 826 (1920); 3 ILL. L. BULL. 3.

[160] 6 E. & B. 370 (1856).

[161] 104 S. E. 252 (Va., 1920); 11 A. L. R. 1174, note.

[162] 4 WIGMORE, EVIDENCE, § 2408.

[163] 2 REAL PROPERTY, 2 ed., 1920, § 462.

[164] "Conditional Delivery of Deeds Direct to the Grantee," 5 MINN. L. REV. 287 (1921), discussing Whitaker *v.* Lane and Mitchell *v.* Clem.

[165] 1 WIS. L. REV. 65 (1921).

[166] 295 Ill. 150, 128 N. E. 815 (1920), three judges dissenting.

[167] 1 LAW OF CONTRACTS, § 212.

[168] 6 E. & B. 370 (1856).

Supreme Lodge v. *Dalzell*.[169] A fraternal order employed a collector of premiums, with whom a written contract was made. The collector, when sued thereon, sought to prove that he was not liable under the terms of a prior oral contract, which was the real agreement between the parties, and that the written contract was a mere sham, intended to deceive other collectors into supposing that all the contracts of the order were uniform. While this evidence is logically admissible to prove that the parties never intended to embody their agreement in the writing, public policy may hold them to their bargain since to set it aside would be unfair to the persons who were meant to be deceived.[170] On the other hand, public policy would seem to favor use of the parol evidence in *Hoefeld* v. *Ozello*,[171] where the written lease of a saloon conformed to the Sunday-closing law, but the lessee when sued for rent sought to show that the true agreement was oral and contemplated violation of that law. The Illinois Supreme Court excluded the evidence, and thus helped to carry out an illegal transaction.

Integration. If the Parol Evidence Rule rests on the principle, as J. B. Thayer, Wigmore, and Williston agree, that the parties have integrated all the terms of their agreement in the writing, so that evidence of a different agreement is irrelevant as proving something without binding force, then the writing is the sole contract for outsiders as much as for the contracting parties.[172] In proceedings *inter alios* parol evidence is inadmissible to prove a different contract, although it may come in for other purposes just as between the parties themselves. The New York Appellate Division has failed to make this distinction and declares that the rule has no application to criminal cases.[173]

The difficult problem of collateral agreements is neatly raised by *Hoyt's Proprietary, Ltd.* v. *Spencer* [174] in New South Wales. A let

[169] 205 Mo. App. 207, 223 S. W. 786 (1920), disapproved in 69 U. PA. L. REV. 78.

[170] This is Wigmore's view, 4 EVIDENCE, § 2406; *contra*, Southern Street Ry. Co. *v.* Metropole Co., 91 Md. 61, 46 Atl. 513 (1900).

[171] 290 Ill. 147, 125 N. E. 5 (1919), disapproved by Costigan in 15 ILL. L. REV. 213; see 5 WIGMORE, § 2406 n. 8.

[172] THAYER, PRELIMINARY TREATISE ON EVIDENCE, 397; 4 WIGMORE, § 2446; 2 WILLISTON, CONTRACTS, § 647.

[173] People *v.* Glickman, 194 App. Div. 103, 185 N. Y. Supp. 307 (1920), disapproved in 34 HARV. L. REV. 790.

[174] 19 N. S. W. Rep. 200 (1919), Ferguson, J., dissenting; noted in 4 MINN. L. REV. 368.

premises to B, who sublet to C in writing with a provision that B might terminate the sublease on four weeks' written notice. B gave such notice. C sued B for violation of a parol agreement made prior to the lease that B would not terminate the sublease unless required to do so by the head lessor, A. A majority of two judges held that this agreement was inadmissible because in conflict with the terms of the lease. One judge thought that B could validly bind himself not to exercise his power. His argument that the parties should be free to make any agreement they choose and modify their rights as they choose, provided they do not contravene some law, virtually begs the question, although it may be a reason for the abolition of the Parol Evidence Rule. The collateral promise might naturally have been embodied in the lease, and should therefore be ineffective if omitted. A Tennessee case [175] seems equally sound in refusing to allow an ordinary deed to be supplemented by proof of an oral agreement by the grantee to erect buildings of a certain quality upon the land conveyed. Such restrictions belonged in the deed.

Scott v. *Albermarle Horse Show Association* [176] presents a harder question. A vendor sought specific performance of a land contract to convey "with general warranty and covenants of title." The purchaser set up the existence of certain building restrictions as incumbrances. The plaintiff offered to rebut this defense by parol evidence that the purchaser knew of these incumbrances and their irremovability at the time of the contract. The court excluded the evidence because it would vary the contract of warranty which specified no such exceptions and dismissed the bill. If the parties' knowledge of the restrictions and their irremovability was adequately proved, then either they were entering on a useless transaction, or else they intended to except the incumbrances from the warranty, but mistakenly failed to do so. The second alternative seems much more sensible, and the parol evidence would thus be admissible to procure reformation for mistake. The decision may, however, be supported on the view of the concurring judge, that the purchaser's knowledge was not established.

[175] McGannon *v.* Farrell, 141 Tenn. 631, 214 S. W. 432 (1919), noted in 5 CORN. L. Q. 336.

[176] 104 S. E. 842 (Va., 1920), Sims, J., concurring; disapproved in 5 MINN. L. REV. 327.

Construction. The extent to which gaps in the description in wills may be filled from parol evidence is discussed by several decisions. Mistakes in section-numbers have provoked a long series of cases in Illinois,[177] of which the latest is *Johnston* v. *Gastman*.[178] The devise called for the east half of lot 1 in the northeast quarter of section 1, which the testator did not own; he did own a tract of the same description in section 2. He made similar mistakes as to two other tracts. A subsequent clause devised all the residue of his property, both real and personal. This residuary clause was held to show an intention to dispose of all his land, so that the court read the words "my property" into the three erroneous specific devises, and then applied the maxim, "falsa demonstratio non nocet," to strike out the incorrect portion of the descriptions, although under the previous Illinois decisions they would have refused to do this in the absence of the residuary clause. The Massachusetts court [179] found it easier to correct the misdescription of a will which bequeathed a fund for the benefit of "the New Bedford Home for Aged People." There was no institution of that precise name, but the fund was claimed by the New Bedford Home for Aged and by the Association for Relief of Aged Women of New Bedford. Evidence was admitted of the surrounding facts known to the testator and his relations to the two claimants. Similar evidence was used by an English judge to limit a bequest "for missionary purposes" to strictly charitable objects.[180] It will be noted that the testator's declarations of intention were not used in the Massachusetts decision, and would doubtless have been excluded, because it was not a case where the description fitted two persons equally well. Such declarations were excluded in California [181] when offered to prove that the words "my heirs" in a will meant only the testatrix's own kin. However, they were admitted

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[177] Kurtz *v.* Hibner, 55 Ill. 514 (1870); Lomax *v.* Lomax, 218 Ill. 629, 75 N. E. 1076 (1905); Stevenson *v.* Stevenson, 285 Ill. 486, 121 N. E. 202 (1918); *contra,* Re Boeck, 160 Wis. 577, 152 N. W. 155 (1915); see Schofield, "So-called Equity Jurisdiction to Construe and Reform Wills" 6 ILL. L. REV. 485 (1912).

[178] 291 Ill. 516, 126 N. E. 172 (1920), noted by Wigmore in 15 ILL. L. REV. 99.

[179] Kingman *v.* New Bedford Home for Aged, 129 N. E. 449 (Mass., 1921), approved in 19 MICH. L. REV. 668.

[180] *In re* Rees, [1920] 2 Ch. 59, Sargant, J.

[181] *In re* Watts' Estate, 198 Pac. 1036 (Cal., 1921), approved in 20 MICH. L. REV. 251.

in the English case of In re *Battie-Wrightson*,[182] to clear up what the judge called a latent ambiguity. A testatrix who had accounts in seven banks gave her balance "at the said bank" to a specified legatee. One of the seven banks had been mentioned in the preceding clause of the will as it was originally executed. This clause had subsequently been cancelled and the will re-executed, so that there was nothing in the will as probated to show what bank was meant. The judge admitted the cancelled clause of the original will for that purpose. The authorities allowing erased portions of a will to be used justified the decision, but he went farther and employed language which would have admitted oral declarations of the testatrix entirely outside of any will, past or present.[183] "Evidence to show the actual testamentary intentions of a testator is admissible only in exceptional cases, one of which is to determine which of several persons or things was intended under an equivocal description." Thus he regards "my said bank" as an instance of equivocation like the bequest to "George Gord," where there were several men of that name, and declarations of intention were let in to show who was meant.[184] The difficult question is whether the description is sufficiently definite to pass anything. Suppose a bequest of "my bonds in the said railroad," and the testator owned bonds of forty railroads, or of "my house-lot," and he owned twenty such lots; would oral declarations of intention be admissible? Is not the hole in the document too big to be filled up? [185]

If the description in the will is equally erroneous when applied to either of two claimants, this has been held not to be an equivocation and parol evidence of the testator's intentions has been excluded.[186] An Irish decision, *Robertson* v. *Flynn*,[187] seems to reach a contrary result. The testator bequeathed property "to my sister Annie Neary." Two of his sisters were Annie Flynn and

[182] [1920] 2 Ch. 330, Astbury, J.; noted in 37 L. QUART. REV. 4.

[183] [1920] 2 Ch. 330, 340.

[184] Doe d. Gord *v.* Needs, 2 M. & W. 129 (1836).

[185] A bequest "to A, his wife, and their daughter," when A had five daughters, was given to his daughter Phoebe, to whom the testator was shown by extrinsic circumstances to be attached. *In re* Jeffery, [1914] 1 Ch. 375, Warrington, J.

[186] Doe d. Hiscocks *v.* Hiscocks, 5 M. &. W. 363 (1839); Drake *v.* Drake, 8 H. L. C. 172 (1860).

[187] I. R. [1920] 1 Ch. 78 (C. A.).

Bridget Neary. The contemporaneous written instructions for the will given to his solicitor were admitted to show that Annie Flynn was meant. Unless such instructions have a superior value to ordinary declarations of intention, the case supports Wigmore's view [188] that such a misdescription is an equivocation.

Competency of Witnesses [189]

The antique disqualification of a party to a civil suit has long been wholly abolished in many states, but others partially preserve it in the so-called "dead man statutes," which forbid the surviving participant in a contract or other transaction to tell about it unless the personal representative of the deceased participant waives the restriction. The purpose is to guard against the danger, sometimes very real, of dishonest claims against decedents' estates. Death gives the survivor of a transaction an unfair advantage. A creditor may lie if his debtor cannot possibly take the stand to tell the truth. There are two ways to equalize this difference in positions. First, the "dead man statutes," which prevent the survivor from lying by forbidding him to testify at all. These give rise to endless difficulties of application,[190] penalize the honest survivor especially when the estate makes unjust claims against him, and represent a last vestige of the old attitude of the law, — if any person is under the slightest temptation to perjure himself, we must assume that neither the law against perjury, nor supernatural punishment, nor his respect for the opinions of his fellow-citizens, nor the grilling of cross-examination, nor common decency will make him truthful, and the only solution is to disqualify him. The modern alternative method of eliminating the inequality between the living and the dead is, not to fasten a special gag upon the living, but to give the dead more freedom from ordinary re-

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[188] 4 Evidence, § 2474.

[189] Children, Goy *v.* Director General, 111 Atl. 855 (N. H., 1920), noted in 7 Va. L. Rev. 663; Maynard *v.* Keough, 145 Minn. 26, 175 N. W. 891 (Minn., 1920), noted in 4 Minn. L. Rev. 549. Jurors, in criminal contempt proceedings against jurors, 5 Corn. L. Q. 164 (1919). Intoxication at time of event, State *v.* Magyar, 114 Atl. 252 (N. J., 1921). Use of drugs, 15 A. L. R. 912. See Locard, *infra*, note 284.

[190] For recent illustrations see "Death of adverse party as affecting evidence with respect to book account," 6 A. L. R. 756 note, and see Mansfield *v.* Gushee, 114 Atl. 296 (Me. 1921); 6 Ia. L. Bull. 61 (1920); 20 Col. L. Rev. 229 (1920); 9 Cal. L. Rev. 347 (1921).

strictions. Several states let the survivor testify, and then get the decedent's story through his hearsay declarations, which come in under a statutory exception to the hearsay rule.[191] They prevent lying by letting in more evidence than usual, and not by shutting ordinarily good evidence out. Even without such new statutes, the time has come in the opinion of Henry W. Taft, in his "Comments on Will Contests in New York," [192] to abolish the "dead man" disqualification:

"This restriction not infrequently works intolerable hardship in preventing the establishment of a meritorious claim. Furthermore, it has been enforced with the most rigorous literalness, and has been the occasion of a labyrinth of subtle decisions. A long experience leads me to believe that the evils guarded against do not justify the retention of the rule. In the early development of our jurisprudence the testimony of all interested witnesses was excluded; but experience gradually led to the conclusion that the restriction should be relaxed and more reliance should be placed upon the efficacy of our process of investigating truth. Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party, and where that has failed the scrutiny to which the testimony of a witness is subjected by the court and by the jury, has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness."

In criminal cases at common law the accused was incompetent to testify under oath and was denied counsel. He was, however, allowed to make an unsworn statement, which consisted partly of presentation of facts and partly of argument on facts and law.[193] Does this right survive under modern statutes in the British Empire and the United States, which provide counsel and (except in Georgia) allow the accused to testify if he so desires? In a recent New Zealand case[194] the practice there and in England is described. The accused, whether defended by counsel or not, is permitted as part of his defense to make a statement not on oath, if he does not elect to be sworn as witness. This statement

[191] MASS. G. L. (1921) c. 233, § 66; CONN. GEN. STAT. (1918), §§ 5735, 5736; 1 OLSON, ORE. LAWS (1920), § 732; R. I. LAWS, 1915, ch. 1259.

[192] Address to the Association of the Bar of the City of New York, Jan. 13, 1921, printed in 30 YALE L. J. 593, 605 (1921).

[193] 1 WIGMORE, EVIDENCE, §§ 575, 579.

[194] Rex *v.* Perry, [1920] N. Z. L. R. 21, noted in 5 MINN. L. REV. 390.

is not subjected to cross-examination but the prosecutor may call evidence to contradict it. The statement is evidence for the consideration of the jury. In the United States courts, in prosecutions under the Espionage Act, this practice was usually followed, but when Townley, the president of the Non-Partisan League, was tried in Minnesota under the state war act, the privilege of speaking was refused him by the trial judge, who was held on appeal to have full discretion in the matter.[195] This agrees with the American authorities, but the discretion may wisely be exercised in the prisoner's favor in sedition trials, in accordance with the federal practice.[196]

The frequency with which attorneys act as witnesses in cases that they are trying, is made the subject of severe condemnation by Wigmore [197] in commenting on an Illinois decision. Since the courts, though giving little weight to the attorney's testimony, cannot exclude it, Wigmore recommends that the objectionable practice should be stopped by some kind of professional punishment.

The competency of husband and wife will be discussed in connection with their privileged communications.

PRIVILEGE

Privilege against Self-incrimination.[198] A review of this privilege with especial reference to the Iowa law is presented by D. O. McGovney in his discussion of the bill drafted by the Iowa Code Commission regarding self-criminating and self-disgracing testimony.[199] The bill continues the present Iowa privilege for answers which tend to expose the witness to "public ignominy." McGovney suggests that the witness is sufficiently protected if he be excused from such an answer when cross-examined to test his credibility, and that such protection may best be left to the dis-

[195] State *v.* Townley, 182 N. W. 773 (Minn., 1921), approved in 5 MINN. L. REV. 553, 35 HARV. L. REV. 86.

[196] Robert Ferrari, "The Trial of Political Prisoners Here and Abroad," 66 DIAL 647 (June 28, 1919); Z. CHAFEE, JR., FREEDOM OF SPEECH, 85 and 136.

[197] 16 ILL. L. REV. 241, noting Eshelman *v.* Rawalt, 298 Ill. 192, 131 N. E. 675 (1921).

[198] Duty of court to instruct witness concerning privilege, 33 HARV. L. REV. 119 (1919). Incrimination under a foreign law, *In re* Cappeau, 198 App. Div. 357, 190 N. Y. Supp. 452 (1921). No waiver by filing involuntary bankruptcy schedules, Arndstein *v.* McCarthy, 254 U. S. 71 (1920). See Bain *v.* United States, note 314.

[199] "Self-criminating and Self-disgracing Testimony Code Revision Bill," 5 IA. L. BULL. 174 (1920).

cretion of the trial judge and not made a hard-and-fast statutory guarantee.

Another recent privilege statute is the National Prohibition Act,[200] which compels all persons to testify even though incriminated, but grants immunity to natural persons in return for their evidence, if given in obedience to a subpœna under oath. The privilege is thus denied to corporations in accordance with settled practice.

The privilege against self-incrimination may be claimed in all kinds of proceedings held under governmental authority.[201] Does it extend to a private inquiry? In *Hickman* v. *London Assurance Corporation*,[202] a fire insurance policy provided that after a fire the insured, as a condition precedent to suit, should submit to an examination under oath before the company's agents when required, and produce his books and papers. The insured refused to answer any incriminating questions at this examination, on the ground that the company had caused a prosecution for arson to be instituted, in which whatever he now said or produced would be used against him. Therefore, he would not consent to testify or furnish books and papers until after the verdict in the prosecution. The criminal proceedings were subsequently dismissed for want of evidence, but no further offer or demand for an examination was made. The policyholder began suit against the company, which set up noncompliance with the condition precedent. The trial judge, sitting without a jury, ruled that the insured was justified by his constitutional privilege, and found for the plaintiff. Although similar clauses have frequently been upheld, this seems to be the first case to raise the question of privilege. The Supreme Court of California entered judgment for the defendants:

"Constitutional immunity has no application to a private examination arising out of a contractual relationship. . . . It must appear that compulsion was sought under public process of some kind." [203]

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[200] 41 STAT. AT L., pt. I, c. 85, Title II, § 30, p. 317, Oct. 28, 1919; noted in 14 ILL. L. REV. 644, by Wigmore.

[201] Criminal contempt proceedings, State *ex rel.* Sandquist *v.* District Court of Blue Earth County, 144 Minn. 326, 175 N. W. 908 (1919); examination before a state council of defense, *Re* Adams, 42 S. D. 592, 176 N. W. 508 (1920).

[202] 195 Pac. 45 (Cal., 1920), approved in 5 MINN. L. REV. 475. See note 227, *infra*.

[203] 195 Pac. 45, 49 (1920).

Consequently, the plaintiff's unjustified rejection of the examination barred his recovery. The court might have advanced an alternative reason, that the privilege was waived by anticipation in the policy.

Whether a prisoner's silence during arrest is an admission of guilt, has already been discussed.[204] A somewhat different problem as to the effect of silence has been raised in British Columbia.[205] The defendants on a charge of wounding with intent to do grievous bodily harm swore at the trial to an alibi. In the police court they had given no indication that this would be their defense. The trial judge instructed the jury that, while the defendants had a right to reserve their defense, they laid themselves open to the suggestion that they did so to prevent the police from investigating the truth of their alibi and their actual whereabouts. This inference from the prisoner's silence before trial was held to violate the Canada Evidence Act, "The failure of the person charged . . . to testify shall not be made the subject of comment by the judge, or by counsel for the prosecution." The case shows how desirable it is that comment should be permitted in the United States and Canada as in England.[206]

Miscellaneous Privileges. In *Blair* v. *United States*[207] the Supreme Court refused to create a new kind of privilege. Witnesses summoned before a federal grand jury, which was investigating the primary expenditures of Senator Newberry of Michigan under the Corrupt Practices Act, refused to answer any questions on the ground that the statute was unconstitutional and the grand jury and the court were consequently without jurisdiction. The witnesses were adjudged guilty of contempt. They were not interested to challenge the jurisdiction of the court or grand jury, or to set limits to the investigation. That was the right of the accused,

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[204] 35 HARV. L. REV. 429 (1922).

[205] Rex *v.* Mah Hong Hing, [1920] 3 W. W. R. 314 (B. C. A. C., 1920), noted in 24 LAW NOTES (N. Y.) 145. *Cf.* Rex *v.* Higgins, 36 New Bruns. 18 (1902).

[206] An interesting sidelight on the value of the privilege against incrimination in examinations by officials outside the court-room was afforded by the examinations of aliens by administrative officers after arrest for deportation, where no privilege existed against the disclosure of information which would render the witness deportable. This topic requires a separate article.

[207] 250 U. S. 273 (1919), approved in 33 HARV. L. REV. 119.

who in fact subsequently succeeded in having the statute declared unconstitutional.[208]

Physical examination of the accused is held in some jurisdictions to be a violation of the privilege against self-incrimination, but it may be required of other persons unless it is outside the common-law powers of the court or unless a special privilege against bodily inspection is recognized. A few jurisdictions will not allow an examination of the plaintiff in a personal injury suit or of the prosecutrix in a trial for sexual offenses.[209] A recent Kentucky case [210] sustains the refusal of the trial court to order an examination of the prosecutrix where the charge was detention against her will with intent to have carnal knowledge, and the defendant set up consent evidenced by prior intimacy. The discretion of the trial judge was properly sustained, but he should be permitted to give such an order when he thinks it desirable, just as he can compel the production of other evidence by orders to testify or to furnish documents. Since the supposed privilege, where it is recognized, is created by the common law and not by the constitution (unlike the privilege against self-incrimination), it should be removed by the legislature, which can expressly confer on the trial judge the necessary powers and specify the legal machinery by which examination is to be compelled.

Privileged Communications. The abolition of the attorney and client privilege was urged long ago by Bentham, but the modern trend has been in the opposite direction toward the statutory extension of the privilege to other professions, such as doctors, trained nurses, and priests. The unsatisfactory effects of these privileges in will cases is set forth by Henry W. Taft.[211] The time has come to overhaul the law on this subject.

The question whether the privilege of attorney and client is only personal to the client is raised by *State* v. *Snook*.[212] In a prosecution for manslaughter for death caused by an automobile, the state wished to show that the defendant was driving while drunk. An-

[208] Newberry *v.* United States, 41 Sup. Ct. 469 (1921).

[209] 4 WIGMORE, EVIDENCE, §§ 2194, 2220.

[210] Thomas *v.* Commonwealth, 188 Ky. 509, 222 S. W. 951(1920). *Accord*, Rettig *v.* State, 233 S. W. 839 (Tex. Cr., 1921), noted in 20 MICH. L. REV. 451.

[211] "Comments on Will Contests in New York," 30 YALE L. J. 593, 605, 606 (1921).

[212] 94 N. J. L. 271, 109 Atl. 289 (1920), affirmance by necessity of 93 N. J. L. 29, 107 Atl. 62 (1919), noted in 18 MICH. L. REV. 781.

other occupant of the car testified that the occupants were all sober. To contradict him, an attorney, whom he consulted after the accident but did not retain, was questioned about the interview. The trial judge ruled that the professional relationship did not exist (erroneously, it seems), and also that even if it did the client alone could claim the privilege. The privilege was not claimed by the consultant, although not expressly waived, but the defendant objected to the lawyer's testimony and excepted. The conviction was sustained by an equally divided court. The result accords with Wigmore's view.[213] Wigmore is logically right, that only the witness's rights are affected by a wrongful denial of the privilege, but nevertheless it seems practically desirable to allow the party to take advantage of such a denial, for otherwise error by the court will not be sufficiently checked. First, suppose the client is on the stand and claims privilege. If the court rules in his favor, evidence will be excluded to the injury of the offering party, who can surely except (unless it is the state, as in this case). Consequently, if the opponent cannot except to a denial of the privilege, the court is tempted to deny it and avoid the chance of a reversal. But, Wigmore replies, the witness's remedy is adequate,—he can keep silent, be committed for contempt, and test the point by *habeas corpus* or other appropriate proceedings. Now, the witness may be willing to do this to uphold his privilege against self-incrimination and possibly his privilege as client when the matter communicated is particularly confidential, but in general he will prefer to disclose it rather than go to all this trouble and expense and perhaps be imprisoned in the end because the doubtful point of privilege will be decided against him. Secondly, suppose the attorney is on the stand and the client is absent or dead. Surely the lawyer, unless his sense of professional obligation is very high, will feel that he has done enough in raising the point and will prefer to submit to the adverse ruling of the trial judge rather than go to jail for his client's sake. All this applies with equal force to the statutory physician and patient privilege. Therefore, while the privilege against self-incrimination should be available to nobody except the witness himself, an improper denial of privilege for a professional communication should be a ground for objection and

[213] 4 EVIDENCE, § 2321.

appeal or exception, not only by the persons immediately concerned, but also by the party opponent.

Attorney and Client.[214] Should the attorney and client privilege exist when the attorney occupies a special position, such as witness to a will or trustee, in which ordinarily full disclosure would be made of facts connected with the performance of this special task?

An attorney who was witness to a will drawn by him was not allowed, in *Anderson* v. *Searles*,[215] to disclose the testator's instructions to him in an action against the estate upon an alleged contract to make a bequest which did not appear in the will. The essential element of confidence seems negatived by the testator when he selects the attorney for a task which by its very nature requires communication. "He cannot be an attesting witness and yet not attest." [216] It is possible to make a distinction in support of *Anderson* v. *Searles;* the evidence was not offered in a proceeding involving the validity or interpretation of the will. In the same way, the privilege might be denied as to the facts of execution and granted as to the preparation of the will. Nevertheless, such fine discriminations are inconvenient, and it seems better that a person whom the testator makes an attesting witness, whether lawyer or layman, should be free to give every bit of information in his possession about the will.

A solicitor was a co-executor and co-trustee in *O'Rourke* v. *Darbishire*,[217] but discovery of professional communications to him from the other executors and trustees was denied by the House of Lords. The will expressly provided that this person might act as solicitor of the trust estate and be paid all proper charges just as if he were not an executor and a trustee. The case decided several important points. (1) Although a lawyer is a co-trustee, communications made him for purposes of legal advice may be privileged. Viscount Finlay said:[218]

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[214] "Privilege of communication to attorney as affected by termination of employment," 5 A. L. R. 728, note. "Privilege of communication to attorney by client in attempt to establish false claim," 5 A. L. R. 977, note; 9 A. L. R. 1081, note.

[215] 93 N. J. L. 227, 107 Atl. 429 (1919), approved by 20 COL. L. REV. 216 (1920).

[216] 4 WIGMORE, EVIDENCE, § 2315.

[217] [1920] A. C. 581 (H. L., E.), affirming *In re* Whitworth, [1919] 1 Ch. 320 (C. A.) which reversed Peterson, J.; noted in 33 HARV. L. REV. 120, 19 MICH. L. REV. 100, 36 L. QUART. REV. 201. *Cf. In re* Postlethwaite, 35 Ch. D. 722 (1887).

[218] [1920] A. C. 581, 602.

"Trustees are entitled to consult a solicitor with reference to the affairs of the trust, and the communications between them and their legal adviser are privileged if for the purpose of obtaining legal advice. Why should such communications be less privileged because the solicitor is himself one of the trustees? . . . Of course the privilege is confined to communications genuinely for the purpose of getting legal advice. It would not extend to mere business communications with reference to the trust, not for the purpose of getting legal advice."

And Lord Sumner added: [219]

"The necessity, which has sometimes been said to be the foundation for the claim of professional privilege, is not the necessity for confiding in the particular solicitor consulted, but the necessity for letting a litigant confide in some solicitor. It is equally obvious that this principle involves allowing the litigant to choose his own solicitor, and to consult the person in whom he feels confidence. To limit the persons among whom he can choose might be to deny him a choice. To say that if he chooses to consult a co-executor he does so on the terms that their written communications will be open to his opponent, so penalises that particular choice, that in effect it is a prohibition."

Lord Parmoor [220] showed that it would be undesirable to compel the trustees to take outside advice in preference to that of the solicitor especially cognizant of the trust affairs. (2) On the other hand, if documents relate to professional advice taken by the trustees on behalf of the interests of the beneficiaries, such documents are part of the property of the estate, and no question of privilege arises. The beneficiaries are entitled to see them because they are beneficiaries; but in this case the plaintiff's claim to be a beneficiary was the point in issue. (3) The Lords recognized that no privilege would exist if the trustees were engaged in defrauding the estate, but the privilege is not overcome if the opposing party merely alleges fraud. There must be something to give color to the charge. The statement must be made in clear and definite terms, and there must be prima facie evidence that it has some foundation in fact.[221] Moreover, the documents must be part of the fraud, and not merely relate to it: [222]

"To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor

[219] [1920] A. C. 615.
[220] *Ibid.*, 621.
[221] *Ibid.*, 604.
[222] *Ibid.*, 613, Lord Sumner.

the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute, or stifle an actual fraud."

(4) It was also held that the privilege was not restricted to documents which the party claiming privilege could put in evidence, but extended to those admissible on behalf of his opponent, or to inadmissible documents for which discovery was sought.

Physician and Patient.[223] Although English doctors occasionally seek the same professional privilege as the bar,[224] Parliament has hitherto wisely refused to imitate the American statutes. Indeed, the English Divorce Court has held [225] that a physician must disclose the physical condition of a patient, although he was compelled to attend him by the National Health Act under statutory regulations enjoining absolute secrecy. The disadvantages of the American medical privilege are brought out by two recent cases. Hospital physicians were forbidden to testify in a personal injury case that when the plaintiff was brought in after the accident they smelled liquor on his breath.[226] A widow suing as beneficiary under an accident insurance policy was unable to recover because the accidental cause of her husband's death could only be proved by the physicians who attended him.[227] Here the privilege, which is supposed to exist for the patient's benefit, operated to defeat one of his most important intentions. The policy provided that satisfactory proofs of death should be furnished, necessarily involving medical

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[223] John B. Sanborn, "Physician's Privilege in Wisconsin," 1 WIS. L. REV. 141 (1921). Physician's death certificate and privilege, Bozicevich *v.* Kenilworth Mercantile Co., 199 Pac. 406 (Utah, 1921). Waiver if patient calls another physician, U. S. Fid. & Guar. Co. *v.* Hood, 124 Miss. 548, 87 So. 115 (1921). "Waiver of a patient's privilege," 31 YALE L. J. 529 (1922).

[224] On the discussions in the British Medical Association, see "The Privilege of Medical Witnesses," 64 SOL. J. 612 (1920); "Professional Privilege," 152 L. T. 53 (1921).

[225] Garner *v.* Garner, 36 T. L. R. 196 (Prob. Div., 1920), McCardie, J.; noted in 64 SOL. J. 218; 23 L. N. (N. Y.) 217; 84 JUST. P. 51.

[226] Owens *v.* Kansas City, etc., Ry. Co., 225 S. W. 234 (Mo. App., 1920).

[227] Maine *v.* Maryland Casualty Co., 172 Wis. 350, 178 N. W. 749 (1920), two judges dissenting, noted by John B. Sanborn, "Physician's Privilege in Wisconsin," 1 WIS. L. REV. 141, 144; 5 MINN. L. REV. 157; 19 MICH. L. REV. 202; 15 A. L. R. 1544. This case is opposed to my suggestion of anticipatory waiver of privilege by the policy in Hickman *v.* London Assurance Corporation, page 684, *supra.*

evidence, but this was held not to be a waiver of the privilege by the patient, and it had been established by prior decisions that after his death no one was allowed to waive it. Wigmore's view that nobody except the patient may take advantage of the privilege [228] would have accomplished a just result in this case. Certainly a person directly antagonistic to the patient should not profit from the privilege. The case shows the need of immediate legislation in every state where the statute makes no express provision for waiver after the patient's death.

Legislatures and courts have been occupied for over a century in closing the physician's mouth in the very place where the truth is badly needed. And yet the much more important obligation of his silence in private life has hardly been considered by the law at all.[229] We have put our money on the wrong horse. In the few instances where honest patients do dread disclosure of their physical condition by a doctor, their fear is not that the truth may some day be forced from him in court, but that he may voluntarily spread the facts among his friends and theirs in conversation; and against this really dangerous possibility the statutes give almost no protection. The first and only decision on the doctor's liability to pay damages to his patient for a breach of confidence was made in 1920, under the common law, and recovery was denied, although a possible liability under different circumstances was suggested by the Nebraska court.[230]

In states where the patient's privilege exists, only information necessary to enable the doctor to act in his professional capacity is privileged. Matters which are entirely distinct from medical facts may be disclosed; for instance, the patient's remarks about his will. Oftentimes, however, the illness and another fact are closely connected, as in a recent divorce proceeding,[231] where a physician was asked to disclose a communication as to the paternity of an expected child, though it must have been given as a sequel to the mother's disclosure of her pregnancy, which was clearly privileged

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[228] Note 213, *supra*.

[229] 4 WIGMORE, EVIDENCE, § 2380; Z. Chafee, Jr. "The Doctor as Witness," *N. Y. Evening Post*, July 2, 1921.

[230] Simonsen *v.* Swenson, 104 Neb. 224, 177 N. W. 831 (1920); noted in 34 HARV. L. REV. 312; 20 COL. L. REV. 890; 30 YALE L. J. 289; s. c., 38 MED. LEG. J. 13.

[231] Stillman *v.* Stillman (N. Y. Sup. Ct., referee's ruling, 1921, unreported).

and could not be repeated. A similar problem arises when the victim of an accident in describing his symptoms to a physician throws in occasional statements about the way he was hurt. Of course, the speed of the trolley car which hit him and the fact that he himself was not looking as he crossed the street are not really necessary for the application of surgical dressings, and the legitimacy of an expected child has no bearing on the medicines or osteopathic treatment which should be given to the mother. (If the doctor were a psychiatrist, curing her of melancholia or some other mental or nervous disorder, information on such a fact would be highly important.)

Logically, it may be that the facts leading up to a physical condition are often not "necessary to enable the physician to act in a professional capacity" and consequently are not protected by the statute, but practically it is very unjust to a patient, consulting a physician in a state where the law insists that the utmost confidence shall be preserved, if his conversation with the physician can be sifted out by the law into two classes of utterances and one class will be kept secret. One sentence will be held necessary for treatment but the next, dealing only with the cause of the ailment, receives no protection. The dividing line may fall in the middle of a sentence. What sort of confidence is secured by the statute if a sick and perhaps hysterical patient must be constantly on the alert, every time a question is asked him, to determine at his peril whether it is necessary for treatment, and, even if it is, must be watchful lest he add something to his answer which is not necessary? If the privilege is to exist at all, the New York court was wise in taking the position that all the communications of the patient which are actuated by his feeling of confidence in his medical adviser and which he would naturally make in furnishing the doctor with information as a basis of treatment are entitled to secrecy, even though some of these facts if wrenched from the conversation and taken singly had no medical value. A patient should not be forced to tell his story to the doctor with the circumspection of a lawyer.

Marital Incompetency and Privilege. A husband or wife at common law could not testify for or against each other. The injustice of this rule is shown by an Illinois case in which two women were tried for murder, and the husband of one of them was unable to

testify that he saw a suspicious-looking man near the scene of the crime because this would tend to cause the acquittal of his own wife as well as the other woman.[232] A somewhat different obstacle was overcome in Pennsylvania, when a husband was allowed to testify against a doctor who had caused the wife's death by a criminal operation.[233] He did not testify against his wife, inasmuch as she was not an accomplice to the crime but only a victim. Furthermore, death should terminate the incompetency, for his disparagement of his wife's conduct can no longer disturb marital relations. Incompetency should not survive like the privilege of marital communications, where the preservation of secrecy after death is helpful in encouraging full confidence during life. For similar reasons, the wife becomes a competent witness against her husband after divorce, but confidential marital communications cannot be divulged.[234] In many states, statutes limit the privilege to "confidential communications,"[235] and the restriction might well be implied even when the statute reads "any communication."[236]

Government Informants. The principle that communications to public officials for use in the prosecution of crime are not to be disclosed without the consent of the Government has long been established. In *Attorney General* v. *Tufts*,[237] a proceeding for the removal of a District Attorney, which was brought by the Attorney General, the latter offered evidence of conversation between the District Attorney and persons who, fearing that they might be

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[232] People *v.* Holtz, 294 Ill. 143, 128 N. E. 341, 350 (1920), disapproved by Wigmore, 15 ILL. L. REV. 453. If statute allows wife to testify for her husband but not against him, her evidence in his behalf cannot in Texas be impeached by her prior inconsistent statements. Doggett *v.* State, 86 Tex. Cr. 98, 215 S. W. 454 (1919), noted in 33 HARV. L. REV. 873; *accord*, Turner *v.* State, 89 Tex. Cr. 615, 232 S. W. 801 (1921); but her testimony may be broken down on cross-examination, Boaz *v.* State, 89 Tex. Cr. 515, 231 S. W. 790 (1920).

[233] Commonwealth *v.* Bricker, 74 Pa. Super. Ct. 234 (1920), noted in "The Privileged Character of Anti-marital Testimony," 69 U. PA. L. REV. 164.

[234] Patterson *v.* Hill, 212 Mich. 635, 180 N. W. 352 (1920), approved by 69 U. PA. L. REV. 382.

[235] Stillman *v.* Stillman, 187 N. Y. Supp. 383 (1921). A charge of infidelity was held to be a confidential communication in Gisel *v.* Gisel, 219 S. W. 664 (Mo. App., 1920), noted in 21 LAW SER. MO. BULL. 40.

[236] *Contra*, Pugsley *v.* Smyth, 98 Ore. 448, 194 Pac. 686 (1921), disapproved in 19 MICH. L. REV. 655.

[237] 132 N. E. 322 (Mass., 1921). See also "Privilege of communications made to public officers," 9 A. L. R. 1099 (1920).

accused of crime, went to show themselves to him and, if possible, avert the apprehended prosecution. The District Attorney objected that these communications were privileged since they were made to him in his official capacity. The Court held that the privilege prevented communications made in order to secure the enforcement of the law from being revealed at the instance of private parties in aid of actions at law, but that it had no application to the case at bar. The Commonwealth was here proceeding through the Attorney General to inquire into the fitness of an important official, and had waived whatever privilege it might have in order to obtain a full investigation. The same privilege was also limited in *Centoamore* v. *State*.[238] The defendant was convicted of a serious crime, largely on the testimony of a girl. The trial court excluded her prior statements to the County Attorney that another person had committed the crime. This was held erroneous, since the public policy behind the privilege was outweighed by the importance of acquitting the accused if innocent.[239] Indeed, since the identity of the informant was known, disclosure would have no bad effect.

An interesting question arose at the trial of *Colyer* v. *Skeffington*.[240] The head of the local Bureau of Investigation of the Department of Justice was asked how many men he had detailed to arrest aliens for deportation during a raid. He declined to answer, but under threat of contempt proceedings, he eventually arranged to submit the figures privately to the judge on a slip of paper so that the Government should not be injured by publicity about the size of its secret police force.[241]

Miscellaneous Privileged Communications.[242] Information given to a Juvenile Court judge by a boy under his care about the murder of the boy's father was held not to be privileged in a much discussed case, *Lindsey* v. *The People*.[243] The relation between the

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[238] 181 N. W. 182 (Neb., 1920), approved in 5 MINN. L. REV. 570 and 35 HARV. L. REV. 209.

[239] See 4 WIGMORE, EVIDENCE, § 2374, who would always allow disclosure of the contents, and limit the privilege to the identity of the informant.

[240] 265 Fed. 17, 67 (D. C., Mass., 1920). This incident was reported only in the daily press.

[241] See 4 WIGMORE, EVIDENCE, § 2375, on privilege for secrets of state.

[242] Peculiar English privilege for sources of newspaper information, Lyle-Samuel *v.* Odhams, [1920] 1 K. B. 5 (C. A.), noted in 34 HARV. L. REV. 213.

[243] 66 Colo. 343, 181 Pac. 531 (1919), noted in "Must We Recognize a New Privi-

boy and the judge is analogous to that between a client and his counsel, so that a well-recognized privilege might have been extended to cover this case. The administration of the Juvenile Court undoubtedly depends upon the encouragement of complete confidence in its wards. On the other hand, confidence between children and their parents is equally desirable, and yet the law gives no secrecy. In view of the undesirable results which have come from established privileges, the Colorado court might well have hesitated to act without legislation. The fact that, in spite of the widespread attention which this case has received, the Colorado legislature has failed to provide subsequently for the privilege, indicates that the decision conformed to the local views on the conflicting policies involved in the situation.

Communications from a ghost have been held privileged in the past,[244] but the modern appetite for psychic phenomena would be gratified by a different decision to-day.

Searches and Seizures

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Similar guarantees are given by most state constitutions. A long-standing controversy about the effect of these clauses upon the law of Evidence has received new life from the fact that infractions of the Fourth Amendment frequently interfere with the consumption of liquor in violation of the Eighteenth Amendment. The weight of state authority, which has the strong backing of Wigmore,[245] has held that evidence obtained by an unconstitutional seizure is admissible as much as any other evidence secured by illegal means. The only remedy of the injured person is a civil

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lege in the Law of Evidence?" 33 HARV. L. REV. 88; 29 YALE L. J. 356; 4 MINN. L. REV. 227.

[244] Blewett Lee, "Psychic Phenomena and the Law," 34 HARV. L. REV. 625, 634 (1921).

[245] 4 EVIDENCE, § 2264; 9 ILL. L. REV. 43; 15 ILL. L. REV. 393.

action against the offending official, although a recent South Carolina case [246] held the official liable in a prosecution for assault. At any rate, this view would not let an offender go free because a Government official has also done wrong. It would place the penalty for the violation of the Constitution upon the official and not upon society. The opposing view makes the evidence inadmissible if obtained through unreasonable seizure, just as the violation of the privilege against self-incrimination results in the exclusion of the incriminatory statement. Although other kinds of illegality do not keep out evidence, in this instance the illegality is condemned by the Constitution. Some effective sanction should be provided to make sure that the Constitution is enforced. The civil action for damages is insufficient to-day. When the victims of wrongful search represented a popular majority contending against an unpopular government, large verdicts were given by the jurors which belonged to that majority; but it is very unlikely that the damages awarded to Wilkes and his friends by juries of London citizens would be given by an American jury to a radical alien whose constitutional rights were violated by the agents of the Department of Justice.[247] The Fourth Amendment would be a dead letter if the United States Supreme Court had not since the decision in *Weeks* v. *United States* [248] adopted the exclusion theory. The recent case of *Silverthorne Lumber Company* v. *United States* [249] gives additional strength to the Constitution. Representatives of the Department of Justice, without a shadow of authority, went to the office of a corporation and made a clean sweep of all the books, papers and documents found there. Photographs and copies of

[246] State *v.* Wagstaff, 115 S. C. 198, 105 S. E. 283 (1920), liquor case. A bill was introduced in the last session of Congress, imposing a criminal liability upon officials committing illegal searches and seizures. (66th Congress, 2d. Sess., H. R. 12816).

[247] Colyer *v.* Skeffington, 265 Fed. 17, 25, 44, and *passim* (D. C., Mass., 1920) describes the extent of these violations in the Communist raids of Jan. 2, 1920. The Government took no appeal from this portion of the case. See also the reports of Senators Walsh and Stirling to the Senate Committee on the Judiciary. The silence of the press with respect to the repeated violations of the Constitution in this and other raids against radicals contrasts significantly with the numerous editorial protests against illegal seizures of liquor and stills.

[248] 232 U. S. 383, 392 (1914).

[249] 251 U. S. 385 (1920), White, C. J., and Pitney, J., dissenting; noted in 33 HARV. L. REV. 869, 958; 20 COL. L. REV. 484; 8 CAL. L. REV. 347; 8 GEO. L. J. No. 3, p. 31; 6 VA. L. REG. N. S. 223.

material papers were made and an indictment was framed, based upon the knowledge thus obtained. The originals were then returned to the corporation. Subpœnas to produce these originals were then served and failure to obey these was punished by the District Court as contempt. The Supreme Court reversed the judgment. Justice Holmes said that it would reduce the Fourth Amendment to a form of words if the protection of the Constitution covered only the physical possession of the documents but not the advantages that the Government gains over the object of its pursuit by doing the forbidden act. The seizure was, he said, admittedly an "outrage," and he refused to allow the Government to make any use of the knowledge gained through its wrong-doing.

The effect of the Supreme Court decisions upon state courts is beginning to be felt. Although the majority of these limit redress to a civil action,[250] Michigan[251] and Kentucky[252] have lately held the evidence inadmissible. In fact the Kentucky decision has gone beyond the Federal doctrine in two respects. The United States courts usually require a petition for the return of the evidence to be made within a reasonable time after the discovery of the illegal seizure.[253] The Kentucky court says:[254]

"In our practice the proper time, and the only time, in which objection can be made to the introduction of evidence by the mouth of wit-

[250] Recent instances are Rippey *v.* State, 86 Tex. Crim. 539, 219 S. W. 463 (1920); Benson *v.* State, 233 S. W. 758 (Ark., 1921); Johnson *v.* State, 151 Ga. 21, 109 S. E. 662 (1921). See "Right to recover property held by public authorities as evidence for use in a criminal trial," 11 A. L. R. 681, annotating Azparren *v.* Ferrel, 191 Pac. 571 (Nev., 1920) which refused replevin.

[251] People *v.* Le Vasseur, 213 Mich. 177, 182 N. W. 60 (1921); disapproved in 20 MICH. L. REV. 108; People *v.* Marxhausen, 204 Mich. 559, 171 N. W. 557 (1919); see also People *v.* De La Mater, 213 Mich. 167, 182 N. W. 57 (1921). *Accord*, People *v.* Mayen, 35 Cal. App. Dec. 442, 660 (1921), noted in 10 CALIFORNIA L. REV. 165.

[252] Youman *v.* Commonwealth, 189 Ky. 152, 224 S. W. 860 (1920), approved in 19 MICH. L. REV. 355; 6 VA. L. REG. N. S. 850.

[253] Weeks *v.* United States, *supra*. In Amos *v.* United States, 255 U. S. 313 (1921), it was filed after the trial began; noted in 5 MINN. L. REV. 465. However, in Colyer *v.* Skeffington, *supra*, no petition for return was made, and none was filed in Holmes *v.* United States, 275 Fed. 49 (C. C. A., 4th, 1921), noted in 35 HARV. L. REV. 470. In Gouled *v.* United States, *infra*, note 262, failure to make application before trial was excused because the defendant first knew of the seizure when the evidence was offered.

[254] Youman *v.* Commonwealth, 189 Ky. 152, 169, 224 S. W. 860, 867 (1920). The illegality is immaterial if raised for the first time on appeal, Bruner *v.* Commonwealth, 233 S. W. 795 (Ky., 1921).

nesses is when it is offered during the trial, and we cannot think of any good reason why this practice should not obtain in a case like the one we are now considering."

Also, the Kentucky court reversed the order of the trial judge, that the whiskey be confiscated and poured by the sheriff of the county into a sewer, and ordered it returned to the owner; while at least one United States District Judge[255] has held that while the illegal seizure requires a conviction to be set aside — "The Eighteenth Amendment to the Federal Constitution is as sacred as the Fourth and Fifth Amendments, but no more so"[256] — the illicit mash, liquors, stills, and parts of stills would not be returned because they were contraband and might be again used in violation of the law.

An exhaustive article, "Concerning Searches and Seizures," by Osmond K. Fraenkel,[257] reviews the decisions before the end of 1920. He agrees with Wigmore that the famous opinion of Justice Bradley in *Boyd* v. *United States*[258] is open to just criticism for stating that unreasonable searches and seizures violate both the Fourth Amendment and the privilege in the Fifth Amendment against self-incrimination. Wigmore has shown that the history of the two constitutional rights is entirely distinct, the privilege originating in the sixteenth and seventeenth centuries, especially through the agitation of John Lilburn, popularly known as "Freeborn John," and the Fourth Amendment in the eighteenth century, especially through the agitation of John Wilkes and the decisions of Chief Justice Pratt, afterwards Lord Camden. Wigmore also seems logically correct in believing that the two rights dovetail into each other. The privilege is violated when a man

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[255] United States *v.* Rykowski, 267 Fed. 866 (S. D., Ohio, 1920), Sater, J., noted in 21 COL. L. REV. 291; 15 ILL. L. REV. 532. This seems to be the practice in the District of Massachusetts.

[256] 267 Fed. 866, 871 (1920).

[257] 34 HARV. L. REV. 361 (1921). See also "Search, Seizure, and the Fourth and Fifth Amendments," 31 YALE L. J. 518 (1922); "Constitutionality of the La Follette Amendment to the Internal Revenue Law of 1921" (requiring a federal income tax return to specify what state and municipal bonds are owned by the tax-payer), 20 MICH. L. REV. 527 (1922); 10 CALIF. L. REV. 165; 16 ILL. L. REV. 392; T. R. POWELL, "The Supreme Court's Construction of the Federal Constitution in 1920–21," 20 MICH. L. REV. 381, 390–400.

[258] 116 U. S. 616 (1886).

is compelled to do something active, whereas he usually remains passive during an unreasonable search and seizure.[259] On the other hand, Fraenkel points out that there has been a very close association of ideas with respect to the two rights.[260] He concludes his article with a statement of the then pending case of *Gouled* v. *United States*,[261] in which six questions had been submitted to the United States Supreme Court, and ventured a prophecy as to the answers to these questions which might be expected from the Court.

On February 28th, 1921, the Supreme Court decided *Gouled* v. *United States*,[262] and it is interesting to note what answers agreed with Fraenkel's expectations. The most important point decided was the extent to which seizure may lawfully be authorized by search warrant. Title XI of the Espionage Act provides that search warrants may be issued when the property to be seized is used as the means of committing a felony.[263] The defendants were indicted for conspiracy to defraud the United States through contracts with it for clothing and equipment. A search warrant directed the seizure of a certain contract between one defendant and an outside person, which was said to be used "as a means of committing a felony, to wit . . . as a means for the bribery of a certain officer of the United States." As a matter of fact, the contract was not criminal, and was not part of any bribery, but was valuable to the Government only as evidence against the defendant. The Court held that the contract was inadmissible because the warrant was not really issued to obtain the instrumentality of a crime but for the purpose of seeking evidence. For example, a letter from the defendant to the officer offering him a bribe could be seized under a proper search warrant but not a letter to some other person admitting the fact of bribery. This result was in accordance with decisions in the lower United States courts and

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[259] See note 245, *supra*.

[260] 34 HARV L. REV.. 361, 364, 366, 367; Matter of Foster, 139 App. Div. 769, 124 N. Y. Supp. 667 (1910).

[261] 264 Fed. 839 (C. C. A., 2d., 1920), see note 262, *infra;* 34 HARV. L. REV. 385-387.

[262] 255 U. S. 298 (1921), noted with varying views in 30 YALE L. J. 769; 5 MINN. L. REV. 465; 20 MICH. L. REV. 93; 70 U. PA. L. REV. 55. See also 31 YALE L. J. 521.

[263] Act June 15, 1917, c. 30, Title XI, § 2, 40 STAT. at L. 228.

the anticipation of Fraenkel.[264] Unfortunately, the form in which the case was certified to the Supreme Court makes it impossible to limit the decision to the sensible proposition of statutory construction, that Congress had not as yet authorized the seizure of purely evidentiary material. The decision necessarily holds that such a seizure violates the Constitution, so that Congress cannot authorize it hereafter, even with a search warrant. Consequently, a criminal, who is clever enough to gather into his possession all the damaging documents which are not actually instruments of crime, will always be able to defy the Government to make the slightest use of such papers against him. What are the police to do, even though they know exactly where the evidence is? They can not obtain a subpoena *duces tecum* ordering him to bring the papers into court himself, for that would violate his privilege against self-incrimination. They cannot break into his house with a search warrant and take the papers from him by force, because the warrant would be invalid and the evidence wholly inadmissible, at least if the accused made a seasonable demand for its return. This "astonishing situation" stirs the *Yale Law Journal* to apply Wigmore's phrase, "justice tampered with mercy."[265]

The Court also held, contrary to Fraenkel's prophecy, that the admission of unlawfully seized papers was a violation of the privilege against self-incrimination in the Fifth Amendment. This holding seems to establish beyond further question the overlapping of the Fourth and Fifth Amendments propounded by Justice Bradley in *Boyd* v. *United States*.

In each instance where the *Gouled* case differs from Fraenkel's forecast, the Court gave increased force to the constitutional guarantee. One more such point should be noted. In *United States* v. *Maresca*[266] Judge Hough had held that if the government detective obtained books by fraud or guile without use of force, the

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[264] 34 HARV. L. REV. 361, 379, note 116, 387. Fraenkel, however, expected that the affirmative answer would be qualified probably as indicated in MacKnight *v.* United States, 263 Fed. 832 (C. C. A., 1st, 1920) and Haywood *v.* United States, 268 Fed. 795 (C. C. A., 7th, 1920). The Supreme Court does not mention any qualifications. The Haywood case is questioned, *infra*, page 704.

[265] 31 YALE L. J. 522.

[266] 266 Fed. 713 (S. D. N. Y., 1920); disapproved in 21 COL. L. REV. 193; approved by Wigmore in 15 ILL. L. REV. 393, and by Fraenkel in 34 HARV. L. REV. 377 and 386, but see 382, note 135.

Fourth Amendment was not violated. In the *Gouled* case the Circuit Court of Appeals for the Second Circuit certified to the Supreme Court the question whether "the secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only," by a government representative, violated the Amendment. The Supreme Court gave an affirmative reply,[267] thus apparently overruling the *Maresca* case. The security or privacy of the home or office would be as much invaded and the search and seizure as much against the owner's will, whether admission was obtained by force and coercion, or by stealth or through social acquaintance or in the guise of a business call, and whether the owner was present or absent. The protection of the Constitution is carried a step farther by the companion decision of *Amos* v. *United States*,[268] which holds that there is implied coercion when government officers come without warrant and demand admission to make search under government authority. No consent can be implied under such circumstances, especially if the owner be absent and his agent in charge of the premises.

The privilege against self-incrimination is not violated, as we have seen,[269] when the compulsion is exerted by a private person, and a similar limitation was applied to the right against unreasonable searches by the latest decision of the Supreme Court, *Burdeau* v. *McDowell*.[270] In the previous cases the attack on the validity of the seizure was collateral, but here it was direct. The proceeding began by a petition to a District Court for the return of papers and books in the possession of a Special Assistant to the Attorney General. The petitioner's employers, suspecting him of fraud, had hired detectives who stole the documents from his private office by blowing open his safes, forcing his desk locks, and breaking into his files. The employers discovered in the papers evidence

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[267] 255 U. S. 298, 305 (1921).

[268] 255 U. S. 313 (1921). *Accord*, Dukes *v.* United States, 275 Fed. 142 (C. C. A., 4th, 1921).

[269] Hickman *v.* London Assurance Corporation, note 202, *supra*.

[270] 41 Sup. Ct. Rep. 574 (1921), Justices Brandeis and Holmes, dissenting; noted in 35 HARV. L. REV. 84; 70 U. PA. L. REV. 54; 31 YALE L. J. 335; 13 A. L. R. 1159; 20 MICH. L. REV. 353; 6 MINN. L. REV. 70; 22 COL. L. REV. 77. However, a post-office inspector is subject to a summary order for the return of papers seized by him, United States *v.* Lydecker, 275 Fed. 976 (W. D. N. Y., 1921).

of fraudulent use of the mails, and voluntarily turned them over to the Department of Justice, which had no prior knowledge of the theft. Before the government officials presented these papers to the grand jury, the petition for their return was filed and granted by the District Judge, on the ground that although no unlawful act had been committed by a representative of the United States, the government should not use stolen property after a demand had been made for its return. He added that the Fourth and Fifth Amendments had been violated. On appeal, his order was reversed by the Supreme Court.

Justice Day, delivering the opinion of the Court, said:[271]

"We do not question the authority of the court to control the disposition of the papers, and come directly to the contention that the constitutional rights of the petitioner were violated. . . . The Fourth Amendment . . . applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. Whatever wrong was done was the act of individuals in taking the property of another. . . . We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property . . . , but with such remedies we are not now concerned."

He added that if the government had learned that papers incriminating McDowell were in the hands of his employers, a subpœna could have issued for their production without violation of the Fourth and Fifth Amendments. Since they had now come into the government's possession without wrong by officials, the wrong of others should not prevent their use in prosecution.

The case really raises two questions. First, the constitutional problem, — was there any violation of the Bill of Rights? The answer is clearly negative, because only private thefts took place. Secondly, had the petitioner a right to recover the documents on some non-constitutional ground? The decision does not throw so much light on this point as we should be glad to get. If a unique chattel is stolen, the owner may recover it in equity from the thief, and may also, if the analogy of trusts applies, follow it into the hands of a donee or taker with notice. The government in this

[271] 41 Sup. Ct. Rep. 574, 575, 576 (1921).

case was not a purchaser for value. Consequently, it was under an equitable obligation to return the documents, unless it could justify its retention of converted papers by the public policy in favor of bringing suspected criminals to justice by all available evidence. Can we say that this policy furnishes a sufficient justification to negative tort liability, except when the Fourth Amendment is violated? To test the matter, would a civil action for trover lie against the Assistant to the Attorney General after demand and refusal? Governmental use is no defense to a civil action when the officials themselves stole the documents; does it become a defense whenever the constitutional protection ceases to operate? Or could it be argued that although Burdeau would be liable at law, equity for reasons of public policy would refuse specific reparation?

The remedy actually chosen was more than a bill in equity; it was a petition to the court as to the control of its own proceedings. It did not ask the court to undergo the burden of compelling an unwilling defendant to surrender chattels; it appealed to the District Judge to right an admitted wrong and administer justice fairly by surrendering stolen papers in his custody. Justice Day expressly said that the District Court had authority to control the disposition of the papers.[272] The judge, as master of proceedings, has a wide discretion to determine what evidence may properly be laid before the grand jury, and it would seem a reasonable exercise of that discretion for him to return stolen evidence to the petitioning owners, no matter who stole it, and insist that if the prosecution wants to offer it, a proper search warrant or subpœna *duces tecum* must be issued. The arguments made by Wigmore[273] against collateral attack do not cover this problem. Justice Day's argument that a subpœna could have been issued[274] does not meet the fact that none was issued. Such writs are not mere forms. Evidence seized without a search warrant cannot be retained on the ground that a search warrant would have been granted if applied for.

The reasons for allowing this exercise of discretionary power by the judge are set forth in Justice Brandeis's dissent, in which Justice Holmes concurred:[275]

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[272] 41 Sup. Ct. Rep. 575.
[273] 4 EVIDENCE, §§ 2183, 2264.
[274] 41 Sup. Ct. Rep. 574, 575.
[275] *Ibid.*

"At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

The theoretical result of the majority view is that the lower judge abuses his discretionary control over evidence if he orders its return because of illegality of seizure, unless that illegality is committed by representatives of the government so as to violate the Bill of Rights. Thus, the preceding decisions of the Supreme Court extended the limits of collateral attack to coincide with the scope of the Fourth Amendment; *Burdeau* v. *McDowell* restricts direct attack to coincide with the same constitutional protection. If evidence is stolen by private persons and turned over to the government, the courts must not return it to the owners, and a conviction secured by its use will not be reversed.

The practical results of this decision are very serious. The way is opened to an easy evasion of the guarantee against unreasonable searches and seizures. The *Silverthorne*, *Gouled*, and *Amos* cases furnish abundant proof that some agents of the Department of Justice occasionally incline to the lawless enforcement of law, and more proof can be found in decisions by District and Circuit judges.[276] The Supreme Court has made it emphatic that if the agents themselves commit lawless acts they will be forbidden to use the evidence. That road is closed; but they know from the *Burdeau* case that if private detectives break in and steal, and then the papers come into the hands of the Department of Justice, the course is smooth. This creates a strong temptation, which may not always be resisted, to arrange for searching and seizing by non-governmental agencies. The courts must be vigilant to detect any connection, before the searching and seizing, between the federal detectives and the private detectives.[277]

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[276] See 34 HARV. L. REV., 382, note 135; *supra*, note 247.

[277] The Interchurch World Movement Report on the Steel Strike of 1919, page 18, finds: "The Federal Department of Justice seems to have placed undue reliance on co-operation with corporations' secret services." See also page 225.

Interesting questions are raised by two decisions in lower United States courts. In *Haywood* v. *United States*,[278] the court stated that agents of the Department of Justice, without proper search warrants, raided the offices of the I. W. W. in various cities and seized their files of correspondence with copies of newspapers and pamphlets. The greater part was taken from the Chicago office in charge of Haywood. He and other members of the organization were indicted, and five months after the seizure petitioned for return of the documents. The motion was denied, and at the trial the evidence was used against them over objection. On appeal it was held that they could not complain of any violation of the Fourth Amendment, because the documents did not belong to them, but to the voluntary unincorporated association. This is an interesting recognition of the entity theory of partnerships. And even if the I. W. W., and not its members, owned the property, the case is hard to reconcile with *Silverthorne Lumber Co.* v. *United States*,[279] which held that property belonging to a corporation and illegally seized could not be used against individuals.

The Federal Trade Commission has by statute [280] wide powers to compel individuals to testify and produce documentary evidence, and to obtain for its agents access to "documents, papers, and correspondence in existence at or after the passage" of the statute in the possession of a corporation engaged in interstate or foreign commerce. The question whether these powers violate the Fourth and Fifth Amendments was raised, though not settled, in *United States* v. *Basic Products Co.*,[281] which went off on the point that the scope of the particular order related to the trade secrets and manufacturing costs of a corporation not shown to be engaged in interstate or foreign commerce. An interesting note on this case in the *California Law Review* [282] expresses grave doubts of the constitutionality of the procedure authorized by the Federal Trade Commission Act.

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[278] 268 Fed. 795, 801 (C. C. A. 7th, 1920), citing 4 WIGMORE, EVIDENCE, § 2264 with approval.

[279] 251 U. S. 385, 392 (1920); see note 249, *supra*.

[280] Act of Sept. 26, 1914, c. 311, §§ 4, 6, 38 STAT. AT L. 719, 721; U. S. COMP. STAT. 1918, § 8836 d, f.

[281] 260 Fed. 472 (D. C. W. D. Pa., 1919).

[282] 8 CAL. L. REV. 241 (1920).

THE EXAMINATION OF WITNESSES [283]

Dr. Edmond Locard, Director of the Police Laboratory at Lyons, in his "L'Enquête criminelle et les Methodes scientifiques," [284] besides an interesting discussion of finger-prints, tracks, traces, stains, handwriting, sympathetic inks, and cryptograms, devotes a chapter to testimony. In this he analyzes the psychological process which culminates in the production of evidence by the witness into (1) sensations, (2) perception, (3) fixation, in which memory, imagination, association of ideas, and judgment take part, (4) expression, by which the testimony comes out from the witness's consciousness to enter that of the men in the tribunal (or, if hearsay, into that of another witness). Each stage of the process is presented in detail with the possible opportunities for error. A section on false testimony examines the causes, — fear, affection, interest, revenge, corruption, light-minded acceptance of gossip (légèreté), emotion, and vanity. Pathological false testimony is treated separately in the same concrete fashion, with examples of hysteria, hallucinations, and hypnotism. The section on the testimony of children states as one conclusion: "Le témoignage des filles n'a pratiquement pas plus de valeur que celui des aliénés." He then shows how much testimony is moulded by the questioner, and discusses the technique of examination of a witness on various points, such as accuracy in dates and hours, realiza-

[283] C. J. Ramage, "A Few Rules for the Cross-examination of Witnesses," 91 CENT. L. J. 354 (1920). Statutory abolition of rule in Queen's Case in Virginia, 107 S. E. 697 (Va., 1921). "Cross-examination of witnesses called to testify on particular point or under order of court," 7 A. L. R. 1116, note (1920). "Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility," 6 A. L. R. 1608 (1920). "Testimony tending to show that party or witness has made contradictory statements as ground for evidence as to his truth and veracity," 6 A.L.R. 862, note; see also Orris *v.* Chicago, R. I. & P. R. R. Co., 279 Mo. 1, 214 S. W. 124 (Mo., 1919), noted in 18 LAW SER. MO. BULL. 43. Scotch statute on impeachment by prior inconsistent statements, J. C. Lorimer, 36 SCOT. L. REV. 168 (1920). Impeachment of witness by extrinsic evidence of inconsistent statement, State *v.* Claymonst, 114 Atl. 155 (N. J. Sup., 1921). Examination of witness by judge allowed, People *v.* Limeberry, 298 Ill. 355, 131 N. E. 691, 698 (1921); denied, State *v.* Sandquist, 178 N. W. 883 (Minn., 1920), noted in 30 YALE L. J. 196. "Admissibility of evidence of good reputation for truth and veracity of witness who has not been impeached," 15 A. L. R. 1065, note (1921). Impeachment by conviction for misdemeanor, 20 MICH. L. REV. 126.

[284] Bibliotèque de Philosophie Scientifique, Paris, 1920.

tion of direction, quantity, and size, capacity to identify a dead body or recognize persons. One example will illustrate the readable nature of the book.[285] A teacher arranged for the sudden entrance into the lecture-room of a man wearing a clown's mask. The students were then asked to pick this mask out from a set of ten. Of the twenty-three who ventured a choice only five were right, and this was perhaps the effect of chance. Such experiments throw doubt on much identification testimony.

A brief summary of the experience of French psychiatrists and experts in legal medicine is given in the *Journal of Criminal Law and Criminology*,[286] and a note on "Identification from Photograph" [287] in *Law Notes* points out the possibilities of error as urged in a recent case, for which Dr. Locard's book would have furnished many parallels.

Impeachment. The proposal of scientists to subject witnesses to intelligence tests has been discussed in an earlier portion of this article.[288] Similar legal obstacles arose in *State* v. *Driver*,[289] when the defendant on a charge of attempted rape offered a physician and a psychologist, who after explaining the immorality and untrustworthiness of morons sought to state that the testimony of the prosecutrix proved her to be a moron. This evidence was held properly excluded, on the ground that the character of a witness cannot be attacked generally except by evidence of her bad reputation for veracity. "It is yet to be demonstrated that the psychological and medical tests are practical, and will detect the lie on the witness stand." The case thus excludes evidence of mental defectiveness insufficient to constitute insanity.

Somewhat opposed is *State* v. *Prentice*,[290] an Iowa prosecution for automobile stealing, in which the state was allowed to show that an important alibi witness had bought morphine from a druggist at various times ending over six months before the theft, and had been seen on various undated and unenumerated occasions to

[285] *Op. cit.*, 95.

[286] T. A. Williams, "Some Remarks about Testimony," 10 J. CRIM. L. AND CRIM. 609 (1920).

[287] 23 LAW NOTES (N. Y.) 83 (1919).

[288] 35 HARV. L. REV. 307 (1922).

[289] 107 S. E. 189 (W. Va., 1921), noted in 15 A. L. R. 932, "Impeachment of witness by expert evidence tending to show mental or moral defects."

[290] 183 N. W. 411 (Iowa, 1921), noted in 31 YALE L. J. 97; 15 A. L. R. 912.

dissolve little white tablets and inject the solution hypodermically. Three situations may be distinguished. (a) Proof that the witness was actually under the influence of the drug on the day of the alleged alibi (or when testifying) would clearly be admissible to attack her specific credibility. It shows that definite inability existed at a significant moment. (b) Proof that the witness's mental powers were permanently impaired by drugs might also come in, like evidence of near-sightedness, deafness, etc. To demonstrate an absolutely continuous condition shows that such a condition existed at any given significant moment. (c) The case at bar, however, involves evidence of a much weaker nature. At best it established a frequent, but not a continuous, subjection to drugs, and nothing was said directly to show impaired mentality. It was possible that the woman's mind was normally clear between the observed occasions of use or purchase, and that the alibi occurred during such a lucid interval. The case involves too many weak logical links to be satisfactory, but it indicates a trend toward wider inquiries into the witness's general mental capacity, which may find room for expert grading of morons and other feeble-minded types.

A preliminary question is required in many jurisdictions before impeachment by a prior inconsistent statement, but a recent South Dakota case [291] shows it is unnecessary before extrinsic proof that the witness has committed acts which show bias or corruption. The mere fact that he was offered a bribe seems hardly enough to impeach the witness, although it is probably not collateral, for it was an admission by the party who tried to bribe him that his case was bad. Possibly the court was convinced that the offer was accepted.

An unusually interesting problem of impeachment by conduct is raised by *Hardy* v. *State*.[292] The defendant in a prosecution for murder admitted the killing but set up self-defense. He took the stand and was asked on cross-examination if he had not said before the trial, "I killed two men, and twelve men will try to get me; and if they convict me and don't watch me, I will get some of them." After his denial, the state proved the making of this threat

[291] State *v.* Smith, 183 N. W. 873 (S. D., 1921) — full opinion.

[292] 86 Tex. Cr. App. 515, 217 S. W. 939 (1920); noted in 8 A. L. R. 1361, "Admissibility of threats by accused against jury or prosecuting attorney in criminal case."

against the jury, by a witness who heard it. The judge's refusal to strike out this testimony was held cause for reversal. The threat is not collateral, because such an attitude might well be regarded as inconsistent with innocence. On the other hand, it is susceptible of another explanation, that he resented prosecution for a non-criminal act. The evidence would certainly incline the jury against the accused, and they might give it a greater weight than it deserves. Its relevance is perhaps outweighed by its prejudicial effect. A different objection might be taken to the question on cross-examination, that it violates the orthodox rule limiting cross-examination to the scope of direct examination. This is unsound, first, because this rule does not prevent questions going to bias or other elements of credibility, such as prior convictions;[293] and secondly, because that rule should not apply to the accused, inasmuch as the state is unable to call him as its own witness when it wishes to go outside the scope of the direct examination.

Cross v. *State*[294] holds that a confession, which was improperly obtained and not admissible as actual evidence, cannot be used as a prior inconsistent statement to impeach the credibility of the testimony of the accused. This result does not necessarily follow. The ordinary prior inconsistent statement is available as such, though not evidence in itself, and even a confession improperly obtained is sufficiently trustworthy to be admissible against its maker in a civil action, and if made by a witness in any proceeding would probably be available to attack his credibility on the ground of inconsistency.[295] The problem resembles that of the impeachment of a wife's testimony on behalf of her husband by her prior inconsistent statements unfavorable to him, which are

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[293] State *v.* McBride, 231 S. W. 592 (Mo., 1921) — statute enacting orthodox rule, but allowing "impeachment."

[294] 142 Tenn. 510, 221 S. W. 489 (Tenn., 1920), noted in 9 A. L. R. 1358, "Use of confession improperly obtained, for purpose of impeaching defendant as a witness."

[295] Such a problem might have arisen in People *v.* Lindsey, *supra*, note 243, where the boy's testimony was impeached by his inconsistent confession to the Juvenile Court judge. Even if he confessed under promise of immunity, the statement seems admissible if no privilege exists. In State *v.* Geddes, 22 Mont. 68, 55 Pac. 919 (1899), and State *v.* Miller, 68 Wash. 239, 122 Pac. 1066 (1912), an accomplice under threats and inducements turned the state's evidence and gave testimony implicating himself, which was admitted; so also, Newhall *v.* Jenkins, 2 Gray (Mass.) 562 (1854), a civil case. See WIGMORE, EVIDENCE, § 815.

unavailable as actual evidence because of her privilege.[296] However, if Wigmore[297] is right in saying that the basis of the confession rule is the desirability of an unusually high degree of caution toward suspicious testimony when it tends to injure an accused person, this caution would seem to apply to the confession, whether introduced as actual evidence or for purposes of impeachment, and *Cross* v. *State*[298] is sound.

The danger of narrow construction of Evidence statutes is shown by an Oregon decision,[299] holding that proof of bias was not "impeachment" but only "discrediting," especially as it was not one of the methods specified in the statute "by which a witness may be impeached."[300] The dissenting judge, while finding no prejudicial error, put himself on record that impeaching and discrediting were the same thing, that bias was one method of impeachment, classified as such by Wigmore, and that the statute listing methods of impeachment should not be construed as exhaustive.

A liberal Utah decision[301] allows a party to impeach his own witness by prior inconsistent statements.

Whether the disbarment of a witness may be used to impeach him, like conviction of crime, is asked but not decided by *State* v. *Egan*,[302] which holds that at any rate the opinions of the disbarring court are inadmissible.

Use of memoranda in testifying. The complexity of modern life makes it impossible for any one to remember many facts which may subsequently become important in litigation, but that very complexity has brought about the increased keeping of written records in which these facts are preserved. Consequently, courts should be extremely liberal in allowing witnesses to use such records, either to revive their memory or as a substitute for it. Unfortunately, many courts have taken an extremely narrow attitude, such as the rule in New York and the United States courts,[303] that the writing is inadmissible unless it actually refreshes the witness's

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[296] Note 232, *supra*.

[297] 1 EVIDENCE, § 821, note 2, paragraph 4, collects the cases.

[298] Note 294, *supra*.

[299] State *v.* Holbrook, 98 Ore. 43, 188 Pac. 947 (1920), Bennett, J., dissenting.

[300] 1 OLSON, ORE. LAWS (1920), §§ 863, 864.

[301] State *v.* Scott, 55 Utah, 553, 188 Pac. 860 (1920).

[302] 183 N. W. 652 (S. D., 1921).

[303] 1 WIGMORE, EVIDENCE, § 738.

present memory or unless his mind is a complete blank. Thus the honest witness who admits a hazy recollection is penalized by losing the best means of proof, and the dishonest witness is encouraged to say the writing brings all the facts back to him when he really remembers nothing but reading the words on the paper before him.[304]

A full discussion of present memory refreshed is given by a Connecticut decision,[305] reversing the ruling of the trial judge that a detective could not refresh her recollection from typewritten daily reports made by a stenographer from the detective's dictation because not written by her or verified at the time. Missouri[306] has allowed a similar refreshing from a report of testimony before the grand jury. An informal account-book kept by the witness was admitted as past recollection recorded by the Supreme Court of Minnesota,[307] who pointed out that the case was independent of the statutory hearsay exception for account-books. An Iowa case,[308] though excluding the record for insufficient evidence of accuracy, contains a good statement of principles. A Washington decision,[309] resembling *Mayor of New York* v. *Second Ave. Ry.*,[310] allowed a woman to prove the time she had worked, from a book in which her husband had placed the figures each day at her dictation, she being unable to read or write. The book was verified from time to time by the employer, and the wife testified, but apparently not the husband.

Conclusion[311]

The need of simplification of the law of Evidence is obvious from the preceding long survey of two years' output of decisions.

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[304] Arthur Train, The Prisoner at the Bar, c. XII.

[305] Neff *v.* Neff, 114 Atl. 126 (Conn., 1921).

[306] State *v.* De Priest, 232 S. W. 83 (Mo., 1921), distinguishing State *v.* Patton, 255 Mo. 245, 164 S. W. 223 (1914), which was disapproved by 5 Wigmore, Evidence, § 759. *Cf.* Putnam *v.* United States, 162 U. S. 687 (1896). See also Gass *v.* United Rys. Co., 232 S. W. 160 (Mo. App., 1921), 35 Harv. L. Rev. 442, note 106.

[307] Force Bros. *v.* Gottwald, 183 N. W. 356, 359 (Minn., 1921).

[308] State *v.* Easter, 185 Iowa, 476, 170 N. W. 748 (1919), noted in 5 Iowa L. Bull. 115.

[309] Foy *v.* Pacific Power & Light Co., 110 Wash. 248, 188 Pac. 514 (1920).

[310] 102 N. Y. 572 (1886).

[311] The following points not discussed in the article may be noted: Legality of con-

Such a simplification is likely to come in the near future through several methods. First, trial judges may be given increasing power to make a final determination whether testimony shall be admitted or excluded. Already refusals to reverse are frequent when the error was not clearly shown to be prejudicial, and the old Exchequer rule has also been abolished by statute in several jurisdictions.[312] Among such statutes is the Act of Congress of February 26, 1919,[313] amending section 269 of the Judicial Code by requiring an appellate court to give judgment "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." It has already been applied in several decisions relating to rulings on evidence.[314]

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tract to procure evidence, Johnson *v.* Higgins, 108 Atl. 647 (Del., 1917), noted in 33 HARV. L. REV. 984. Curative admissibility, Graham *v.* Commonwealth, 103 S. E. 565 (Va., 1920), noted in 7 VA. L. REV. 157; MacDonald *v.* United States, 264 Fed. 733, 739 (C. C. A., 1st, 1920); State *v.* Ritter, 231 S. W. 606 (Mo., 1921). Waiver of defendant's motion to discharge in criminal cases by his introduction of evidence, Wukina *v.* State, 128 N. E. 435 (Ind., 1920), noted in 21 COLUMBIA L. REV. 193. Expunging false testimony by bill in equity after conviction, Coppock *v.* Reed, 178 N. W. 382 (Ia., 1920) noted in 6 IA. L. B. 119. Conviction of perjury on circumstantial evidence, State *v.* Storey, 182 N. W. 613 (Minn., 1921), noted in 5 MINN. L. REV. 553; 15 A. L. R. 634. N. C. Collier, "Discovery under New Rules of Practice for Federal Courts of Equity," 91 CENT. L. J. 428 (1920). "Power of court to issue or to honor letters rogatory," 9 A. L. R. 966, note (1920). L. P. Baumblatt, "Law of Evidence in Wisconsin," 4 MARQUETTE L. REV. 45, 94, 158 (1919, 1920). "The offer of proof in grounding exceptions," 31 YALE L. J. 542 (1922). Statutes requiring two witnesses to prove lost will, 7 CORN. L. Q. 69 (1921).

The question of prior crimes, discussed in a previous instalment, has just been treated by F. L. Stow, "Evidence of Similar Facts," 38 LAW Q. REV. 63 (1922).

[312] Austin W. Scott, "Progress of the Law, 1918–1919 — Civil Procedure," 33 HARV. L. REV. 236, 250 and notes (1919).

[313] 40 STAT. AT L., c. 48, 1181, U. S. COMP. STAT., 1919 Annot. p. 273.

[314] Horning *v.* District of Columbia, 254 U.S. 135 (1920), *supra*, 35 HARV. L. REV., 432; Thompson *v.* United States, 258 Fed. 196 (C. C. A., 8th, 1919); Bain *v.* United States, 262 Fed. 664 (C. C. A., 6th, 1920), notice to accused to produce papers as violation of privilege; Sneierson *v.* United States, 264 Fed. 268 (C. C. A., 4th, 1920), admission of stenographic notes; MacDonald *v.* United States, 264 Fed. 733, 756 (C. C. A., 1st, 1920) in dissenting opinion, *supra*, 35 HARV. L. REV. 435; Haywood *v.* United States, 268 Fed. 795, 798 (C. C. A., 7th, 1920), *supra*, note 278, statute held constitutional; Kennedy *v.* United States, 275 Fed. 182 (C. C. A., 4th, 1921). It was held in August *v.* United States, 257 Fed. 388 (C. C. A., 8th, 1918), that the statute authorized a review by the appellate court of errors to which no exception was taken. This has always been possible in criminal cases, Wiborg *v.* United States, 163 U. S. 632, 659 (1896), but it is doubtful if the statute enlarges the power or extends it to civil cases. See Storgard *v.* France & Canada S. S. Corp., 263 Fed. 545 (C. C. A., 2nd, 1920); Rosen *v.* United States, 271 Fed. 651 (C. C. A., 2nd, 1920).

Secondly, it will not do to leave everything to the discretion of a particular trial judge, or at least he must be guided in his rulings on evidence by some established principles, so that members of the bar may know how to present their cases, instead of being at the mercy of the unaided individual judgment of one man. These principles have in the past been established in two ways. (a) Decisions of appellate courts. These will not suffice as a guide in the future so much as in the past, for we hope that they will become far less frequent, and that many points which often arise in practice will never be taken up on appeal. Moreover, reform of existing bad judge-made rules will be slow indeed, if every one of them has to be appealed by some adventurous litigant to the highest court of his state, with the hope that it will overrule the decisions now in force. (b) Legislation affords a cheaper and more rapid method of progress, for it can act without waiting for a point to arise in a specific litigation, and it can alter a dozen or a hundred bad rules at one stroke. Nevertheless, a modern legislature is occupied with too many exciting topics to spare time and energy for the painstaking task of revising the law of Evidence, and its members are chosen for other qualifications than those which this task demands. Moreover, such a revision should not be made once for all, but should be subject to flexible modification as unsatisfactory rules make themselves plain. In short, changes in the rules of proof ought in large measure to be made by the men who are in daily contact with the operation of those rules, instead of by legislators, who are unfamiliar with them and may not fairly be requested to give the immense labor necessary to understand them. Legislative changes in this field are rarely made except in response to some isolated legislator or some powerful group who feel aggrieved by a recent decision, or else after prolonged and tedious effort by a bar association. The same considerations which have led the American Bar Association to suggest that procedure at law in the United States courts should be regulated by power given to the Supreme Court to make rules of court (similar to its existing rule-making power in equity) and have prompted similar proposals as to procedure in many states,[315] also make legislation desirable empowering courts of last resort to lay down the rules which are

[315] A. W. Scott, *op. cit.*, in note 46, 236–238 and notes.

to guide trial judges in large portions of the law of Evidence. Such a power is clearly suitable to the form and manner of taking testimony,[316] such as judicial notice, the scope of cross-examination, impeaching one's own witness, hypothetical questions to experts, opinions by lay witnesses, etc. These are purely machinery of the trial. On the other hand, self-incrimination, a matter of constitutional construction, and the parol evidence rule, which determines the legal effect of contracts, seem outside the proper scope of rule-making. Between lies a debatable ground. A rule shifting the burden of proof in a tort action to the defendant, while nominally procedural, may as a practical matter impose a liability in many cases where the plaintiff would not recover if the burden were on him. A rule making hearsay generally admissible may greatly widen the possibilities of recovery on doubtful claims. Consequently, it may be that judges ought not to make changes in such portions of Evidence except as the outcome of litigation where each side of the matter is hard-fought by counsel, and that any sweeping alterations should be left to the action of the legislature, which expresses more fully the popular will. Others will prefer to embrace even these topics within the judicial rule-making power, on the ground that the present law was made by judges and should be changed by judges, being on the whole procedural rather than substantive. However, such problems do not need to be worked out until the rule-making power for Evidence is more nearly within grasp than now.

Thirdly, whatever body builds the future law of Evidence, a great deal of surveying and digging is necessary to prepare the site, and this must largely be done through prior research by law teachers, writers, judges, and practitioners. Fortunately, most of the work of criticism of the existing law and promulgation of the right principles for the new system has already been accomplished, first by Bentham and then by Wigmore. The most hopeful impression derived from a lengthy examination of recent decisions is the frequency with which Wigmore's Treatise on Evidence is cited by the courts. More than any other textbook, it is actually making law. Yet it is a long step from criticism and the establishment of

[316] A bill giving this rule-making power was introduced a few years ago in the Ohio legislature, but failed of passage.

right principles to the actual submission of drafts of desirable rules for the consideration of legislatures or rule-making courts. Much assistance in this step will, it is hoped, be given by the investigations of the Commonwealth Fund [317] and other foundations. Before many years, we ought to be able to report real progress in the law of Evidence.

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[317] Commonwealth Fund, Annual Report, 1921, 12; Benjamin N. Cardozo, "A Ministry of Justice," 35 HARV. L. REV. 113, 125 (1921).